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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. ---------.

DANIEL L. KAYSER and LEIGHTON W. KAYSER,

Petitioners,

vs.

THE CLEVELAND CLINIC FOUNDATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Daniel L. Kayser and Leighton W. Kayser, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in the above entitled case on December 10, 1969.

OPINIONS BELOW.

The opinion of the Court of Common Pleas for Cuyahoga County, Ohio is unreported and is printed in the Appendix hereto, *infra*, page 15. The opinion of the Court of Appeals for Cuyahoga County, Ohio, the Eighth Judicial District is printed in the Appendix hereto, *infra*, page 21. The Journal Entry of the Supreme Court of Ohio overruling the within Petitioners' Motion for an order directing the Cuyahoga County Court of Appeals to certify its record is printed in the Appendix hereto, *infra*, page 41.

STATEMENT OF JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on December 10, 1969. There was no motion for a rehearing.

The jurisdiction of the Court is invoked under 28 U.S.C. Section 1257 (3) and the U. S. Supreme Court Rule 22 (3) inasmuch as the Ohio courts have denied the Petitioners the rights and privileges guaranteed under the Constitution of the United States.

QUESTIONS PRESENTED.

I. May a Court of Appeals judge reverse a Common Pleas Court Jury verdict in Cuyahoga County, Ohio and then also sit as a member of the Ohio Supreme Court which refuses to certify the record of such reversal without thereby violating the Petitioners' right to due process and equal protection under the U. S. Constitution?

II. Shall a jury verdict for a Plaintiff, which the Court of Appeals found was supported by evidence that some injury was sustained to the Plaintiff's spine due to a hospital bed fall, be reversed by the same Court of Appeals reweighing the evidence without having such action amount to a denial of the right to a trial by jury and a denial of due process?

III. When the Respondent's negligence results in a new injury to the Petitioner's spinal cord, which new injury terminated any opportunity the Petitioner had to accurately determine the degree of recovery he would have had from a prior spinal cord injury, may the Respondent use as a shield the original injury to avoid liability and not violate the Petitioner's right to due process and equal protection under the U. S. Constitution?

IV. May the Court of Appeals and Ohio Supreme Court reverse a jury verdict for the Petitioners for lack of expert medical testimony when the Petitioners did have a medical expert, licensed by the State of Ohio, testify that Petitioner's entire condition of quadriplegia was due to his fall from the hospital bed without denying him due process and equal protection under the U. S. Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED.

The United States Constitutional provisions involved herein is the XIV Amendment which reads in part:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws * * *."

STATEMENT OF THE CASE.

The within Petitioner, Daniel L. Kayser, was injured in an auto accident on June 13, 1962. After emergency treatment at Willard Hospital, he was taken by ambulance to The Cleveland Clinic Foundation, the within Respondent.

X-rays were taken at The Cleveland Clinic, upon Daniel L. Kayser's arrival, and it was determined by Dr. Dohn of The Cleveland Clinic staff that he had sustained fractures of the lamina process at the level of C-4 and C-5 with probable spinal cord compression.

Dr. Dohn performed a surgical procedure known as a cervical laminectomy at the C-4 and C-5 level within a few hours after Daniel L. Kayser was admitted to The Cleveland Clinic. Following the June 13, 1962 surgery, Dr. Dohn in his post operative report stated, "The cord

actually looked in good condition. There was no swelling or hematoma formation."

Also following surgery, Dr. Dohn saw Daniel L. Kayser's father and Dr. Dohn told him the spinal cord looked good, that he was happy with what he found and that he felt everything was all right.

On June 14th, the day following surgery, Danny Kayser was making good progress according to the hospital records.

On June 15th Danny Kayser was progressing so well that he was taken out of intensive care and put into a ward on a Stryker frame bed.

On June 16th Dr. Thomas Tank, a resident in neurosurgery at The Cleveland Clinic Foundation, and an employee of The Cleveland Clinic, gave orders to nurse Ann Phoenix, also of The Cleveland Clinic, to rotate Danny Kayser in the Stryker frame.

At the time that nurse Phoenix attempted to rotate the Stryker frame bed with Danny Kayser in it, this was the first time she had ever operated such a bed and Dr. Tank knew it.

When the Stryker bed was turned by nurse Phoenix, the supporting frames separated and Danny Kayser fell to the floor with nurse Phoenix trying to stop his fall by grabbing him about the head.

From the time Danny Kayser fell from the hospital bed his condition worsened whereby his vital signs changed radically. Dr. Tank testified upon cross-examination that changes in the vital signs would appear if a patient, such as Danny Kayser, had sustained injury due to the hospital bed fall.

On June 16, 1962 at the hour of his fall, his respiration was 16 breaths per minute and from 11:00 P.M. that

night to 7:00 A.M. on June 17, 1962 there is no record of voluntary breathing by the patient. On June 19, 1962 the patient developed paradoxical breathing, which was admitted as being abnormal. Dr. Tank of The Cleveland Clinic, on cross-examination said he did not know if an iron lung was used.

On June 17, 1962, the day following his bed fall, Danny Kayser developed a 100.8° fever which persisted for several days.

On June 16, 1962 prior to the fall Danny Kayser had a pulse of 68 beats per minute and following the fall dropped 12 beats to 56.

After the bed fall Danny developed severe nausea which required that a Levine tube be passed down his nose to his stomach to pump his stomach dry to stop the vomiting. The tube remained in the Plaintiff two days, was removed and due to additional vomiting was reinserted. The Plaintiff lost about 1300 CCS. through vomiting.

From the time of his bed fall on June 16, 1962 to July 19, 1962 when he was first seen by Dr. Ralph Siegenthaler, a Chiropractor at the Hayes Clinic, Danny Kayser's condition did not improve.

On July 19, 1962, Dr. Siegenthaler took X-rays and examined Danny Kayser after obtaining a medical history and determined that he had sustained a subluxation at the point of the atlas and axis vertebrae up under the base of the skull.

Dr. Siegenthaler testified that the first cervical vertebra also known as the C-1 was tilted down on the right causing direct spinal cord pressure.

In answer to a hypothetical question, Dr. Siegenthaler testified that in his opinion all of Danny Kayser's

injuries were a direct result of his fall from the hospital bed. *No objection* was made to the question or answer.

Dr. Siegenthaler also testified that the Cleveland Clinic X-rays themselves also showed new injury due to the poker spine effect following the fall.

Dr. Siegenthaler also associated Danny Kayser's fall from the hospital bed to his subsequent disabilities of a subluxation of the C-1 vertebra upon cross-examination by Mr. Warder.

Following treatments by Dr. Siegenthaler, Danny Kayser, who had about 10 per cent bodily function originally, has improved to about 30 per cent.

A jury in the trial of the within facts awarded the Petitioners, Danny Kayser, Two Hundred Thousand Dollars ($200,000.00) and his father, who was responsible for his medical bills Twelve Thousand Five Hundred Dollars ($12,500.00), which sum also included his loss of services.

The Journal Entry of said jury verdict is part of the Appendix, *infra*, page 21.

The opinion of the trial Judge, William Ammer, is also in the Appendix wherein he overruled Respondent's motions for judgment notwithstanding the verdict and a motion for a new trial.

Thereafter the Respondent timely filed its notice of appeal with the Court of Appeals of Cuyahoga County, Ohio.

On July 3, 1969 the Cuyahoga County Court of Appeals published its opinion which is contained in the Appendix, page 21, *infra*, reversing the within jury verdict.

The opinion reversing the jury verdict was written by Judge J. J. P. Corrigan of the Cuyahoga County Court of Appeals.

From said reversal the Petitioners on August 29, 1969 timely filed their memorandum in support of claimed jurisdiction in the Supreme Court of Ohio.

On September 16, 1969, Judge J. J. P. Corrigan who wrote the Court of Appeals opinion herein, was sworn in as a Justice of the Ohio Supreme Court.

On December 10, 1969, the Supreme Court of the State of Ohio overruled the Petitioners' Motion for an order directing the Court of Appeals to certify its record with Justice J. J. P. Corrigan sitting on the case.

REASONS FOR GRANTING THIS WRIT.

The State of Ohio does not have a statute or constitutional provision whereby a justice of its Supreme Court may be disqualified.

Article IV, Section 2 of the Ohio Constitution merely permits the Justice to disqualify himself.

In practice a justice customarily takes no part in the consideration or decision of a case when he would be subject to disqualification. If he disqualifies himself, it is reported as part of the Supreme Court's decision. *McBride vs. The White Motor Co.*, 106 O.S. 656. In this case before the Ohio Supreme Court the Petitioners' motion to certify the record was overruled with Judge J. J. P. Corrigan affirming his own decision and his written opinion from the Cuyahoga County Court of Appeals.

Provision is made in Ohio only to transfer a Court of Appeals Judge, Ohio R.C. 2501.12, and a procedure is also available to disqualify a magistrate or a judge of a court inferior to common pleas, Ohio R.C. 2937.20.

> "A judge should not try a case when there is the least ground upon which to base a claim for his disqualification, and if an error is ever made as to disqualifica-

tion, it should be in favor of the disqualification rather than against it."

Cotulla State Bank vs. Herron, 202 S.W. Rep. 797, Syl. 1.

Once having sat on this case with their colleague, the Ohio Supreme Court would be hard pressed to find among its members anyone not impressed by Justice Corrigan's advocacy.

Mr. Thomas L. Startzman, the Clerk of the Ohio Supreme Court, was directed by counsel for Petitioners to certify to this Court that Justice J. J. P. Corrigan was sworn in as a Justice of the Ohio Supreme Court on September 16, 1969 and as such has continued to serve on the Ohio Supreme Court up to and including the date of the within decision of December 10, 1969. Mr. Startzman, without request by Petitioners, added the further certification that Justice J. J. P. Corrigan did not participate in this case. Because the Ohio Supreme Court only speaks through its Journal I asked to see the public record of such abstention. Mr. Startzman stated that this was a *secret record* of the Ohio Supreme Court's deliberations not available to me or the public. He further stated that in order to get a certificate of Justice Corrigan's sitting on the Ohio Supreme Court I must take it as he had written it. Because this counsel was denied the right to verify the abstention of Justice Corrigan, Petitioners decline to accept that portion of the certification.

The Petitioners are merely praying for an impartial judicial review of the Court of Appeals reversal. The XIV Amendment to our U. S. Constitution assures us of equal protection and due process which is all the Petitioners herein seek.

The Court of Appeals in reversing the jury verdict found in its opinion in part as follows:

> "As pointed out above in this opinion, there is some evidence in the record that Plaintiff, Daniel L. Kayser suffered an injury at the C-1 atlas level of his spine in the fall from the Stryker bed."

The Court of Appeals obviously found that the Petitioners did prove part of their case.

> "Where facts are in dispute and evidence in relation to them is that from which fair-minded men may draw different inferences, the case should go to the jury." *Tiller vs. Atlantic Coast Line R. Co.*, 63 S. C. Rep. 444 Syl. 10, also *Hamden Lodge No. 517, Independent Order of Odd Fellows, et al. v. The Ohio Fuel Gas Co.*, 127 O.S. 469, Syl. 4.

Because all of the evidence in this case had to be weighed as a whole, the jury's determination of the inconsistencies and contradictions in testimony should have been binding upon appeal. *Meyer vs. United States*, 67 F. (2nd) 223.

This same principle was previously determined in the case of *Tennant vs. Peoria & P. U. Ry. Co.*, 321 U.S. 29, which held in part as follows:

> "Appeal and error
>
> The focal point of judicial review of a jury finding is the reasonableness of the particular inference or conclusion drawn by the jury."
>
> "Trial
>
> It is function of jury to weigh contradictory evidence and inferences, judge credibility of witnesses, receive expert instructions, and draw ultimate conclusion as to the facts."

"New trial

Courts cannot reweigh the evidence and set aside a verdict merely because jury could have drawn different inferences or conclusions or because courts feel that other results are more reasonable."

The right of a trial by jury in a civil case is very precious and any attempted usurpation of this right should be severely restrained. When the Ohio Supreme Court does not, or cannot act to protect this right of a trial by jury the U. S. Supreme Court is a citizen's only salvation. *Jacob vs. New York City,* 315 U.S. 752 and also 42 United States Code 1983, Article I Section 5, Constitution of the State of Ohio (Trial by Jury).

A novel feature is presented when the Respondent acknowledges in the midst of trial, that they did drop the Petitioner, Daniel L. Kayser, but it says that he was already paralyzed hence no damage. The new injury sustained by Daniel Kayser was above the old spinal cord injury, hence it was convenient for Respondent to say prove a new injury. The new injury would completely hide any improvement from the original injury other than the changes in the vital signs which changes were proven.

A somewhat parallel set of facts occurred in the case of *Harry J. Hicks, et al. vs. U. S. of America,* 368 Federal Reporter 2nd series on page 632 of Judge Sobeloff's opinion which reads in part as follows:

"When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the changes that has put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what

> would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstances require the plaintiff to show to a certainty that the patient would have lived had she been hospitalized and operated on promptly."

In this case Petitioners presented their evidence of permanent injuries, as did the Respondent its denial, thereafter it became a jury matter. *Atchison T. & S. F. Ry. Co. vs. Condos,* 30 F. (2nd) 669 and 670. *Gallick vs. Baltimore & Ohio Ry. Co.,* 23 Ohio Opinions (2nd) at pages 56 and 57.

The current case somewhat resembles the case of *Quinn vs. United States,* 58 F. (2nd) at page 20 when the Court held in part:

> "Testimony was offered on both sides on the question of the appellee's injuries and disabilities, and whether they were total and permanent during the life of the policy. The jury was carefully instructed by the court as to the essential elements in the plaintiff's case and the burden of proof resting upon him to establish these several elements. It was the peculiar province of the jury to pass upon the conflicting evidence and render a decision on the facts, in harmony with the law, as given to them by the court. The jury reached a verdict in plaintiff's favor, and, giving due effect to the findings of the jury, we are not prepared to say that their judgment was erroneous.
>
> The judgment should therefore be affirmed."

The Court of Appeals in its opinion stated that there was an absence of "expert medical opinion."

Dr. Ralph Siegenthaler, a Chiropractic physician licensed to practice in Ohio did testify that Daniel Kayser's quadriplegia was solely caused by his fall from the hospital bed.

Although the Court of Appeals and Ohio Supreme Court apparently refuse to acknowledge its own statutes, Dr. Siegenthaler is and was licensed to practice limited medicine in Ohio under Revised Code Section 4731.15 which reads in part as follows:

> "4731.15 Examination and registration of practitioners of limited branches of medicine or surgery.
>
> The state medical board shall also examine and register persons desiring to practice any limited branch of medicine or surgery, and shall establish rules and regulations governing such limited practice. Such limited branches of medicine or surgery shall include *chiropractic*, * * * and such other branches of medicine or surgery as the same are defined in section 4731.34 of the Revised Code, except midwifery and osteopathy."

His qualifications were also examined by the state medical board under Ohio Revised Code Section 4731.16, which reads in part as follows:

> "4731.16 Examination
>
> The examination of all applicants shall be conducted under rules prescribed by the state medical board and at such times and places as the board may determine. Such examination shall be given in anatomy, physiology, chemistry, bacteriology, pathology, hygiene, diagnosis, and in such other subjects appropriate to the limited branches of medicine or surgery, certificate to practice which is applied for, as the board may require. Applicants for certificates to practice massage or Swedish movements shall not be examined in pathology and diagnosis."

Since the Ohio Courts did not rule the aforementioned statutes unconstitutional, the Petitioners did have expert medical testimony to prove their case and the is-

sues raised by their expert's testimony were properly put into the hands of the jury to weigh.

To rule otherwise, would be a denial of equal protection of the laws pursuant to the XIV Amendment of our U. S. Constitution. It should be noted that the state medical board is comprised of doctors of medicine who found Dr. Siegenthaler fit for licensing—how now can the Appellate Courts deny his professional expertise?

CONCLUSION.

Only this Court can cure the apparent lack of impartial judicial review of the Court of Appeals reversal of the jury verdict in this case. Judge Corrigan, when sitting on the Ohio Supreme Court, reviewing his own opinion of reversal, not only cast a clouded vote to support his own position, but tarnished the votes of his associate Justices in whose midst he deliberated and debated the motion to certify.

The issue of invading the province of a jury by judicial reweighing of the evidence, and the denial of due process thereby is also of widespread interest.

The most unique feature of this case involves the defense to the element of damages on the basis that the new injury completely covers up any healing of an older injury and the Respondent may thereby say no new harm can be demonstrated. This is a perfect example of using the law as a sword, not as a shield to deny equal protection to a citizen.

The reversal based upon lack of expert medical opinion is a myth, because Dr. Siegenthaler, Petitioners' medical expert, was probably more qualified to testify as the attending physician to Petitioner than any other witness

at the trial. Dr. Siegenthaler at several points in the record testified that all of the Petitioner's paralysis was due to the hospital bed fall. The Court of Appeals reversal was based upon its re-weighing the disputed evidence and then deciding the possibilities were more against the Petitioner which is a denial of due process and equal protection under the XIV Amendment of the U. S. Constitution.

For each and all of the foregoing reasons, Petitioners pray that the writ be granted.

Respectfully submitted,

RICHARD F. PATTON,
Attorney for Petitioners,
Daniel L. Kayser and
Leighton W. Kayser.

APPENDIX.

OPINION OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO.

AMMER, J., Pickaway County, Sitting by Assignment.

This is an action in negligence filed against the Cleveland Clinic and others. A jury trial was had and a verdict returned in favor of the Plaintiff against the Cleveland Clinic alone for the sum of $212,500.00. The Defendant Clinic has filed motions for new trial and for judgment notwithstanding the verdict. Memorandum in support and contra to the motions have been filed and a oral hearing held on the same. There is also furnished to the Court and the Court has reviewed Plaintiffs' exhibit (10) which is the Cleveland Clinic Hospital Records of the Plaintiff Daniel L. Kayser as well as all of the transcript of testimony of Dr. Donald F. Dohn, Dr. Ralph Siegenthaler, Dr. Thomas M. Tank and Dr. Richard Schneider on both direct and cross examination.

There are 8 grounds for the motion for new trial set forth, however claim errors have been argued only as to grounds one, two, and five and therefore the Court will consider that there is no basis as to grounds three, four, six, seven, or eight.

Grounds one, two, and five are as follows:

1. the verdict is against the weight of the evidence both as to proximate cause and as to damages;
2. there is no competent medical evidence that any injury was caused to plaintiff, Daniel Kayser, by the fall from the bed;
5. there was error in admitting certain evidence;

In this regard the Court would note that this case proceeded on the basis that there was a new injury at the area C-1 and that there was no aggravation of the original

lesion at the C-5 level which had resulted from the automobile accident. The defendant contends that there is creditable evidence to support any new lesion which may have caused disability.

In the hypothetical question to Dr. Siegenthaler, a chiropractor, he was asked to assume that the surgeon found the spinal cord at the time of surgery to be in good condition and from other facts in the question was asked to give an opinion based upon reasonable chiropractic certainty as to whether the alleged condition at C-1 was due to the fall from the hospital bed.

To this question the Defendant Clinic raises two issues although there was no objection made to this question at the time it was asked. (1) That it is not possible to determine what is meant by the term "reasonable chiropractic certainty" and (2) that there is a difference in facts set forth in the hypothetical question that the spinal cord was in good condition when the other evidence was to the effect that it was in "apparent good condition." In this regard a point in the testimony of both Dr. Dohn and Dr. Schneider that a cord in apparent good condition can nevertheless be totally destroyed by necrosis. The testimony of Dr. Dohn on cross-examination as to his initial examination appears, starting at page 9, and at page 12 Dr. Dohn stated that he did find the cord actually looked in good condition and that there was no swelling or hematoma formation. At page 14 Dr. Dohn again stated that he found the spinal cord to be in good condition on gross inspection. At pages 27 and 28 Dr. Dohn indicated that some flexor control had returned. At page 69 Dr. Dohn testified as follows:

> "The observation of the spinal cord at surgery really adds very little to the prognosis. That is to say that if we observe the cord, unless it is completely

transected, by that I mean cut in two, we can't predict whether or not the patient is going to recover.

The cord can look perfectly normal to our inspection, but the function in that cord can be completely lost permanently."

At page 76 Dr. Dohn gave an opinion that the fall did not result in any further injury.

The hospital records indicate that on June 14, 1962 and up to the time of the fall the patient was responding to corrective surgery and Dr. Tank stated that following the fall the patient had paradoxical breathing which is abnormal, his respiration dropping from 24 to 12 per minute and that there was an elevation of temperature from 97 degrees to 102 degrees which persisted for several days. Dr. Tank and Dr. Dohn both related measures taken following the fall. Dr. Siegenthaler testified that such changes could be expected from a compression of the spinal cord at the C-1 level.

The Defendant Clinic also attacks the testimony of Dr. Siegenthaler on the ground that his changes in the location of the alleged subluxation during different times of his testimony. In this regard it would appear that Dr. Siegenthaler's testimony indicated that it was in the general area of C-1 and there was nothing to disclose that the difference in his testimony as to the exact location would be significant. Dr. Siegenthaler was cross-examined in considerable detail by counsel for the Defendant but maintained his position that there was a causal relationship between the fall from the bed and the condition at the C-1 level.

Dr. Richard Schneider did not examine the Plaintiff but did testify to a hypothetical question and as to exhibits in evidence particularly x-rays being marked exhibits 7-H, 7-C, and 7-G. Dr. Schneider's testimony reads in part as follows:

Page 8. "A. No, this is an impossible view for that type of injury.

Q. What type of a view would you want, Doctor?

A. We would want a lateral view on that * * *.

Q. Doctor, do you find in those x-rays any evidence of a dislocation at the atlanto-occipital area?

A. No, I do not."

Page 14. "Q. Is the straightness of the cervical spine of any significance?

A. None at all."

Pages 18 and 19. "A. I think that because he has had a further drop in his sensory level, in spite of the fall and because he has had slightly better movement after the fall, one must say that this did not injure him. The fall itself did not injure him.

I would anticipate that if he had fallen and injured his cord further that he would have had, rather than an improvement in his neurologic pattern, that he would have increased neurologic deficit or disability.

Q. Doctor, with a compression of the spinal cord from the posterior at C-5, what signs do you expect to find in the patient?

A. This can vary tremendously with individual patients. We are not talking about Danny now?

Q. Any patient.

A. We're talking about any patient.

They can have an immediate complete paralysis with a complete loss of sensation of all types, motion, position, vibration, pain, temperature. They have a complete loss of bladder and bowel control immediately.

These are the things that one might see with an immediate complete destruction of the cord.

They may have an anterior cord type of pattern with compression from in front of the cord, with a preservation of motion, position and vibration sense, which are posterior of the cord.

They may have a loss of pain and temperature

and touch, partial touch, by injury to the anterior or front side of the cord.

If they have central damage in the cord, again, it depends what fibers they pick off, what tracks or pathways that lead from the brain down to the extremities are picked off and are injured and are irreparably damaged.

Q. Doctor, are there any additional signs you would expect in a patient who has a lesion or compression at the atlanto-occipital level?

A. Most of these people don't survive. It must be remembered that if the cord is cut above the level of C-3 or C-4 or irreparably damaged, which means that one not only has the intercostal muscles which function and cause an expansion of the chest and causes one to breathe, but also has a secondary mechanism knocked out, namely, a paralysis of the diaphragm and the diaphragmatic segments come off at C-2, C-3 and C-4 levels.

The only reason that Danny survived in this situation was the fact that his lesion was below C-2, C-3 and C-4, so that his diaphragms were functioning and very likely, we haven't discussed this, but very likely as happens in the majority of these lesions, their chest does not expand because of the paralysis of the thoracic musculature.

When the section is above, at the atlanto-axial or rather at the occipital level, this is just about an inch below the fourth ventricle, which is where the respiratory and the cardiac centers are, and these individuals then die abruptly in the vast majority of cases.

I may say that that is one of the reasons why the patient whose exhibit we passed around to the jury, one of the reasons why survival of this patient was so unusual and more of the cases are not reported in literature, because most of them die."

Relative to the first contention of the Defendant Clinic that the facts given Dr. Siegenthaler were not in

accordance with the evidence, the Court is of the opinion that the hospital records and the testimony of Dr. Dohn is sufficient for the part of the question relative to the cord being in good condition. It is to be noted that in the question Dr. Siegenthaler was asked to assume the nature of the automobile accident and the subsequent surgery, therefore the Court is of the opinion that the question was proper. In this connection the Court would also note that the Defendant Clinic did not make a timely objection to the hypothetical question. See *Hudson v. Hoster,* 39 O. Law Abst. 9. Relative to the part as to Dr. Siegenthaler changing the location of the site of the subluxation, the Court feels that the testimony is not in conflict in this respect as it was in the same general area.

The basis for a directed verdict or for judgment notwithstanding the verdict is set forth in the case of *Hamden Lodge No. 517, Independent Order of Odd Fellows, et al. vs. The Ohio Fuel Gas Co.,* 127 O.S. 469 in syllabus 3 and 4 as follows:

> 3. "Upon motion to direct a verdict the party against whom the motion is made is entitled to have the evidence construed most strongly in his favor. But if upon any essential issue, after giving the evidence such favorable construction, reasonable minds can come to but one conclusion and that conclusion is adverse to such party, the judge should direct a verdict against him."
>
> 4. "Where from the evidence reasonable minds may reach different conclusions upon any question of fact, *such question of fact is for the jury.* The test is not whether the trial judge would set aside a verdict on the weight of the evidence." Emphasis added.

Applying these tests to the motions before the Court the Court is of the opinion that the grounds one, two and

five of the motion for new trial are not well taken and all the grounds for motion for new trial will be overruled.

The Court is also of the opinion that the motion for judgment notwithstanding the verdict is not well taken and the same will be overruled. Counsel for the Plaintiff will prepare a journal entry.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, CUYAHOGA COUNTY, OHIO.

It is ordered that the defendants, Cleveland Clinic Foundation, Motions for Judgment, notwithstanding the verdict, and the alternate Motions for a New Trial are overruled. Exceptions noted. Bond, $245,000.

/s/ JUDGE WILLIAM AMMER.

Dated: February 6, 1968.

OPINION OF THE COURT OF APPEALS, CUYAHOGA COUNTY, OHIO.

(Dated July 3, 1969.)

APPEARANCES:

For Plaintiffs Appellees: Mr. Robert Bednarczuk and Mr. Richard F. Patton.

For Defendant Appellant: Messrs. Arter & Hadden, Mr. Smith Warder, Of Counsel.

SYLLABUS.

Where, in a trial for damages against a hospital by a plaintiff whose spine was injured in an automobile accident and whose condition was diagnosed medically as traumatic paraplegia and who, while being treated in

such hospital for such condition, was negligently permitted to fall to the floor from a Stryker bed, a licensed chiropractor testifies that the fall from the bed proximately caused plaintiff's paraplegic condition; the question of the fall from the bed proximately causing plaintiff's paraplegic condition should not be submitted to the jury, absent any expert medical testimony that plaintiff would have recovered from the automobile accident injury or any evidence to distinguish the injury, if any, due to each of the two causes.

CORRIGAN, *J.*

Judgments in favor of plaintiffs and against defendant, The Cleveland Clinic Foundation, entered upon jury verdicts returned in the Common Pleas Court of Cuyahoga County, are the subjects of this law appeal before us.

On June 13, 1962, plaintiff Daniel Kayser, 18 years old, sustained an injury to his spine as a result of an automobile accident. He was taken to a hospital in Willard, Ohio, where the attending physician on examination found him to be paralyzed in his lower extremities with partial paralysis of his upper extremities. This physician then accompanied the injured plaintiff in an ambulance to Cleveland Clinic Hospital. A preoperative diagnosis there indicated traumatic paraplegia. Lumbar puncture indicated a complete block. In X-rays taken of the cervical spine no dislocation or subluxation was identified. A cervical laminectomy was performed which disclosed that the spinous process of C-6 was fractured at its distal end; that there was a fracture of the lamina of C-5 bilaterally and of C-4 on the right; that the lamina on the right at C-5 was driven anteriorly and severely compressing the spinal cord; that the sharp edge of the lamina had penetrated the dura to a slight degree and this was elevated and removed;

that the dura was opened and the cord inspected and "the cord actually looked in good condition." The post-operative diagnosis by the neurosurgeon was traumatic paraplegia, secondary to fracture of lamina of C-4 and C-5 with cord compression.

Following surgery, plaintiff, still paralyzed, was placed in a rotating "Stryker" bed. On June 16, 1962, as the bed was being turned by a nurse, plaintiff was negligently permitted to fall out of it. This lawsuit arises from that fall. The amended petition alleges in connection with the fall "* * * that defendant, Mrs. Ann R. Phoenix and plaintiff, Daniel L. Kayser crashed to the floor."

The bill of exceptions definitely covers the actual fall in the testimony of plaintiff, Daniel Kayser, Nurse Ann Phoenix and Thomas O'Mara, a patient in the adjoining bed as follows:

Daniel Kayser: Direct examination:

"* * *, and I remember being on the bed itself, and I remember being turned, starting to turn, and I remember as I was going up gradually to, I'd say a—

* * *
* * *
* * *

She got—as I said, she started up, and she got to what I'd say was a ninety-degree angle, and then everything happened so fast; within a split second I was on the floor, and I remember I had terrible severe pains in my neck, and I was lying there.

The first thing I noticed that I remember is seeing the bed where it had fallen apart in a 'V' shape, where the whole front had just fallen away from me, and I remember being on the floor."

Redirect examination.

"Q. Where was your head in relationship to the floor?

"A. Well, it wasn't on the floor.

"Q. What was it on?

A. I don't know. I guess—well, I just didn't give it a thought what it was on."

Ann Phoenix on cross-examination as part of plaintiff's case in chief:

"A. * * *

Immediately when I noticed that something had went wrong with the bed,—I didn't know what,—I called for help.

Mr. Kayser's shoulders was just a little off.

As you can see, this bed is a narrow bed.

His shoulders was just a little off here.

I called for help.

I put this hand under Mr. Kayser's head, pressed my body this way to hold him in bed, stretched my arms here to hold his paralyzed neck in bed, to keep him in bed, but his legs fell this way, came out. I couldn't keep the bed moving as I was trying to hold him in bed. Mr. Kayser came out this way, with my hand under his head like so, with this arm under his shoulder, his body against me like this.

Ordinarily, you could ease a patient to the floor like so, but I couldn't ease Mr. Kayser like so because he was very heavy and in doing this, I came down like this; my head struck the bedside stand. I fell over, holding Mr. Kayser's head.

I thought of keeping his body straight at all times, which I thought I did.

This is all I can remember.

I do remember Mr. Kayser's head on the floor. I was concerned about his head and I kept asking him if he was all right.

* * *

Q. In other words, he didn't fall out while the bed was being turned? He fell out after you got it flat like this?

A. Yes.

Q. He was lying there in this position when he came out?

A. Mr. Kayser did not fall out of the bed at no time.

Q. I see.

In other words, he didn't get to the floor?

A. Mr. Kayser got to the floor, but with my help, with me, with my arms, with my hand holding his head with this arm under his shoulders with me going down to the floor with him, but Mr. Kayser at no time did not drop to the floor, ever.

Q. How many people helped you put him on the floor?

A. No one.

* * *

Q. I want to hear how you would say it to him.

A. I told Dr. Tank that in the process of bringing the bed back over, I don't know what happened to the bed. Mr. Kayser had a small drop from here and landed on the bed. His shoulders was just a little off the side of the bed.

I used my hand to try to get his shoulders back into bed. I used my body against his body to try to hold his body in bed. His legs fell out.

I had him like this and I eased him to the floor, and in the process of doing so, I struck my head on the side of the bed.

* * *"

The pertinent testimony concerning the fall, of Thomas O'Mara, a patient in the same room with Daniel Kayser, which was by deposition, as part of plaintiff's case in chief, was as follows:

"* * *

Q. Did you see an incident occur when he came out of the bed there?

A. Well, I was lying facing away from him, toward the windows, and I heard him yell, so I turned

over, because I thought I could get the phone to call the nurse, and I wanted to call her if I could help him.

But just as I was turning over, I saw him falling out of bed. The nurse was already there, and she tried to catch him, but the bed was coming down on top of her, so she just put out her arms, and he fell on top of her, and she caught his head so it wouldn't hit the floor."

Plaintiff Daniel L. Kayser further alleges in his amended petition:

"6. Plaintiff Daniel L. Kayser, says he experienced severe pain in said fall from the aforementioned Stryker bed on June 16, 1962; that the spinal cord was caused to be inverted outward in the area of the said laminectomy that was performed on June 13, 1962 by defendant Dr. Donald F. Dohn; that because of the aforementioned fall his chances for recovery were made hopeless and permanent damage resulted therefrom; that his condition became that of traumatic Quadriplegia because of the defendant's negligence.

"7. Plaintiff, Daniel L. Kayser, says that the aforementioned treatment accorded him by the said defendants, Dr. Donald F. Dohn, Cleveland Clinic Foundation and Mrs. Ann R. Phoenix, P. N. from the time he entered the defendant Clinic on June 13, 1962 through June 16, 1962 until after the fall was unusual; that the aforementioned defendants had exclusive control of all of the aforementioned facilities; that the plaintiff being temporarily paralyzed to the degree of helplessness was without any control; that the said plaintiff was not himself negligent in any manner; that said plaintiff sustained severe and permanent injuries.

"8. Solely by reason of the premises, plaintiff says that he received severe permanent injuries to the entire spinal column, permanent paralysis of his entire body below the neck area and other injuries

presently undiagnosed, the allegations of which plaintiff prays leave to complain when ascertained that he does, is and will permanently suffer severe and excruciating pain."

Leighton W. Kayser, father of Daniel Kayser, sues for medical expenses and loss of services.

Answer of defendant The Cleveland Clinic Foundation in part denies that plaintiff Daniel L. Kayser sustained injury of any kind, nature or description at the hands of said defendant and denies that plaintiff Leighton W. Kayser sustained any damage at the hands of this defendant.

Succinctly then, plaintiff, Daniel Kayser, maintains that his present paralyzed condition is due to the fall from the bed and not from the automobile accident. It is defendant hospital's position that plaintiff Daniel Kayser's paralyzed condition was caused by the automobile accident and it denies that said plaintiff sustained injury of any kind or description at the hands of said defendant. The jury awarded $200,000 to Daniel Kayser, and $12,500 to his father, Leighton Kayser.

The Cleveland Clinic Foundation assigns seven claims of error as follows:

1. The trial court erred in failing to direct a verdict in favor of defendant appellant.

2. The verdicts and judgments are contrary to law.

3. The verdicts and judgments are against the weight of the evidence as to each plaintiff, both as to proximate cause and to damages.

4. The verdicts are grossly excessive in amount so as to be incurable by remittitur.

5. The trial court erred in admitting certain evidence.

6. There is a complete failure of proof that any injury was caused to plaintiff, Daniel L. Kayser, by the incident of which he complains.

7. Other errors upon the face of the record to the manifest prejudice of defendant appellant.

As outlined above, the assignments of error do not urge that Cleveland Clinic was not negligent. Rather, twenty-eight pages of appellant's brief do not take up the numerical assignments of error but argue the defendant's appeal on chiefly one broad claim, namely:

"There was no competent evidence that the fall caused any injury whatever to plaintiff."

The other two brief claims are set forth as follows in the brief:

"The judgment is against the weight of the evidence.

"All that has been said foregoing applies to the proposition that the judgment is against the weight of the evidence. The quality of the evidence need not be belabored."

and

"There was error in admitting evidence.

"As already pointed out the court erred in failing to strike Siegenthaler's testimony. Again, with a correct ruling, judgment follows."

Under the provisions of Section 2505.21, Revised Code, we must pass upon each assignment of error and if any are not argued we may treat these as abandoned.

As to the first assignment of error, in failing to direct a verdict for Cleveland Clinic, we find no merit. On the motion of counsel for Cleveland Clinic, after both sides had rested, the trial court directed a verdict against it on the issue of negligence and in the general instructions charged the jury that Cleveland Clinic was negligent as a

matter of law as to plaintiff, Daniel Kayser, falling from the Stryker bed on June 16, 1962.

Then we come to the question of proximate cause and at this point we also consider assignment of error number 6, that there was complete failure of proof that any injury was caused to plaintiff, Daniel L. Kayser, by the incident of which he complains. This claim is not sustained by the record. There is some testimony of a subluxation at C-1 level demonstrated by X-ray picture taken after the fall from the Stryker bed and testified to by Dr. Siegenthaler, plaintiff's witness. This latter witness also testified to observing plaintiff experiencing pain in the region of the neck which was involved in the subluxation which he had diagnosed on July 19, 1962 after the fall from the bed. Plaintiff himself also testified to experiencing "that terrific pain in the neck" after the fall. So, there is evidence of an injury to the neck in the fall.

True, on behalf of the defendant, Dr. Thomas Tank, a neurosurgeon, testified that he attended the plaintiff, Daniel Kayser, immediately after the fall from the bed and found no new injury. Also, Dr. Dohn testified for defendant that he examined Daniel Kayser after the fall and that in his opinion Daniel Kayser had not injured himself in any way as a result thereof. An expert witness for defendant, Dr. Richard C. Schneider, a neurosurgeon, viewed the X-ray exhibits 7-H, 7-C and 7-G, from which plaintiff's chiropractic doctor found a subluxation at C-1, and in his opinion he found no evidence of such a dislocation in the atlanto-occipital area. The triers of the facts passed on this conflicting testimony as is their function, and assignments of error numbers 1 and 6 are overruled.

We consider now claim of error number 3, that the verdicts and judgments are against the weight of the evi-

dence as to each plaintiff, both as to proximate cause and to damages. We have indicated above that the diagnosis after the automobile accident and subsequent surgery on the spine was "traumatic paraplegia, secondary to fracture of lamina of C-4 and C-5 with cord compression." There is not one syllable of medical testimony that Daniel Kayser recovered from this condition, or was recovering, or would have recovered from this condition, at the time of his fall from the Stryker bed. However, there is some evidence of improvement in plaintiff from the time he left the Cleveland Clinic on July 19, 1962, to the time of trial in October, 1967, in the testimony of Dr. Donald F. Dohn at the trial, as follows:

"* * *

Q. Doctor, there has been much testimony here about a transection of the cord. Did Danny have any type of transection of the cord?

A. He had what we called physiologic transection of the cord.

Q. And in your term of reference, Doctor, what does this mean?

A. This means that at this level—in this case at the C-5 level—all function that normally passes by way of this level has been interrupted, so that impulses that normally go down through this segment to the rest of the body cannot pass through,—impulses, nerve impulses I am speaking about that normally pass up through this segment of the cord from the rest of the body can no longer pass through so all function is arrested.

Q. Doctor, when the patient sustains complete motor and sensory paralysis, what is the prognosis?

A. The prognosis is determined in large part by two things. First of all, if one can see the spinal cord at surgery and it's completely anatomically transected so it's divided in half, the prognosis for recovery, in my experience and from the literature, is

nil. There is no way to my knowledge that this person can recover function.

Anything short of anatomical transection, one can only prognosticate on a time interval, because a normal appearing cord does not mean that the patient will recover. On the other hand, a badly bruised cord does not mean that he may not recover.

Now, as a rule of thumb, it has become known in the neurosurgical world, and from the literature, and from our experience, that usually if a patient who presents himself with complete paralysis below the level where the injury occurred, both motor and sensory, and this does not recover after twenty-four hours have elapsed that the prognosis for complete or good recovery is very poor.

Q. Doctor, now I noticed you said for complete or good recovery. Does your statement as you just made it rule out all recovery?

A. No, not at all.

Q. Does this vary from patient to patient?

A. Yes.

* * *

Q. Doctor, you saw Danny in the courtroom, of course?

A. Yes.

Q. Was he better or worse than when you last saw him at the Clinic?

A. He was better.

Q. Medically, how would you account for this?

A. Well, this is what we know happens in many spinal injuries where there has been paralysis.

As time goes on, nerve function is restored. Now this occurs because the segment of the cord that has been damaged reconstitutes itself and nerve impulses can again get down to the parts and back up to the brain, but recovery may not begin for months.

Q. Doctor, one last question.

In your treatment of Danny and from the chart and from your knowledge of his case, have you found

any evidence whatsoever that Danny sustained any permanent injury in his fall from the bed?

A. No, sir."

This testimony is generally supported by the testimony of Dr. Tank and Dr. Schneider. Further the record does not reflect any testimony that the plaintiff's spinal cord was in good condition at the time of surgery. The record shows that Dr. Dohn said, "The cord actually looked in good condition." However, the medical testimony is clear in the record that the cord can look perfectly normal to the neurosurgeon's inspection but that the function in that cord can be completely lost permanently; that the normally appearing cord does not mean a normally functioning cord and that they are divorced properties; that one has no idea how severe the damage is within the center of the cord merely by the way it looks on its outer aspect.

The plaintiff's evidence on proximate cause is contained in the direct and cross-examination of Dr. Ralph Siegenthaler, a chiropractor, as follows:

Direct examination:

"Q. Doctor, I am going to ask you what is known as a hypothetical question. I am going to ask you to put out of your mind everything that you considered in the Danny Kayser case, and only consider those facts which are contained in this hypothetical question.

First of all, consider that this hypothetical man, age 18 years of age, on June 13, 1962, enjoying good health, was involved in an automobile accident on that afternoon, and at that time he was first taken for emergency treatment to the Willard Hospital, and thereafter transferred to the Cleveland Clinic Hospital on the evening of June 13, 1962.

You are to further consider that this hypothetical

boy had surgery on the early morning of June 14, 1962, for a cervical laminectomy at C-4, 5 and 6, which involved a fracture of the lamina of C-5, and slightly penetrating the dura of the spinal cord.

That the surgeon who performed the surgery found the spinal cord at that time was in good condition, and furthermore that the surgeon and the hospital radiologist at that time further found that there was no evidence of dislocation or subluxation from the X-rays at the time of the surgery or the cervical laminectomy at C-4, 5 and 6.

Thereafter this hypothetical boy was dropped from his hospital bed on June 16, 1962, at or about the hour of 10:00 a.m., and he thereafter had pain in his cervical region up to and including the day he was first examined, X-rayed, and treated at Hayes Clinic by two chiropractors.

At the time of the fall from the hospital bed, the nurse attending the hypothetical man tried to stop the hypothetical's man fall from the bed by holding his head in her hands behind his head, and then she tried to keep this man from falling by using her body against his lower extremities.

But his falling lower extremities caused the nurse and the hypothetical man to fall to the floor with the nurse supporting the hypothetical man's head at all times, and at no time did the hypothetical man's head strike the floor, although his shoulders and his extremities below the shoulders were on the floor.

Thereafter, on July 19, 1962, this hypothetical man went to the Hayes Clinic and was examined by two licensed chiropractors, X-rayed, and a history was obtained, and from the X-rays, it was found that he had sustained a subluxation of the C-1 vertebra.

Now, assuming all of these facts to be true, Doctor, do you have an opinion based upon reasonable chiropractic certainty as to whether or not the subluxation of C-1 diagnosed by the Chiropractors on July 19, 1962, was directly and proximately related to

the hypothetical man's fall from the hospital bed on June 16, 1962? Do you have an opinion on that, Doctor? Answer yes or no.

A. Yes.

Q. What is that opinion, Doctor?

A. My opinion is that it was the direct result.

Q. And what are your reasons for that, Doctor?

The Court: Direct result of what?

A. That his injuries were the direct result of the fall."

It should be noted here that there was no objection by defendant to the hypothetical question even though it assumed that the spinal cord was in good condition at the time of surgery. It is further to be noted that the question which was answered covered the direct relationship of the subluxation testified to and the fall from the bed. The trial judge misstated the question asked and the answer to his question necessarily referred back to the injuries posited in the hypothetical query, namely, the subluxation of C-1 diagnosed by the chiropractors.

Later, in the direct examination of Dr. Siegenthaler we find this further opinion testimony:

"Q. Doctor, do you have an opinion based upon reasonable chiropractic certainty as to whether or not Danny sustained permanent injuries as a direct and proximate result of his fall from the hospital bed on the 16th of June, 1962, which resulted in his sustaining a subluxation of the C-1 vertebra.

* * *

And I would also like to include a compression of the spinal cord as you have described it in your original or earlier testimony?

* * *

Objection overruled.

A. Yes.

Q. What is your opinion, Doctor?

A. Well, it's just that I don't ever like to think of a condition like that being permanent. I know it's been a long time, but I mean he's come a long way and there is still plenty, I hope, with himself and myself, I know that he will go a lot further than he has so far. That was the only point I wanted to get across."

It is noted that the "permanent injuries," referred to in the question, are not identified or described.

This is the totality of the testimony on the causal relationship of the fall from the bed and the condition of traumatic quadriplegia up to the cross-examination of Dr. Siegenthaler. It must be remembered that this condition of traumatic paraplegia was the pre-operative diagnosis by the neurosurgeon, Dr. Dohn, with the cause thereof, as "secondary to fracture of lamina of C-4 and C-5 with cord compression."

Then the record reflects the following question and answer sequence in the cross-examination of Dr. Siegenthaler by counsel for the Cleveland Clinic:

"* * *

Q. You also said yesterday that you found pressure on the spinal cord as a result of this subluxation. Did I follow you?

A. Probable pressure against the spinal cord, sir.

Q. How much pressure did you find, Doctor?

A. There is no way to measure the amount of pressure, sir, except by the symptoms of the patient.

Q. From the symptoms of the patient, how much did you find?

A. There was enough to render him in the physical state that he was at when he came into the office.

Q. Now, I want to be perfectly clear on this.

It is your testimony that his physical condition when you first saw him was entirely and wholly the

result of this subluxation of the skull on C-1 or C-1 on the skull. Is this your testimony?

A. This is my testimony.

* * *"

Thus the first evidence as to the fall from the bed proximately causing the condition of quadriplegia.

On further cross-examination we find the following:

"* * *

Q. Doctor, with a compression of the cord at the level that you have described, what signs would you expect in the patient?

A. Headache, rigidity of the muscles right along the base of the skull and through the upper portion right in here, dizziness, nausea, vomiting.

Q. Anything else, Doctor?

How about the extremities?

A. Paralysis.

Q. Total or partial?

That would depend upon the amount of the pressure, would it not?

A. Yes, sir.

In a sense—May I or—

Q. Go ahead.

A. In a sense, I mean, depending on the amount of pressure, it would also depend on actually what was compressed at that specific point, what nerve fibers.

* * *"

And later in the cross-examination:

"* * *

Doctor, assume, if you please, that Danny Kayser was in an automobile accident on the 13th day of July, 1962; that he was brought to the Cleveland Clinic later on the evening, in the evening approximately five to six hours after his automobile accident; that by this time he was quadriplegic.

Assume further that a laminectomy was done at C-4, 5 and 6 level and the cord was found to be compressed at the C-5 level. The pressure was removed and the cord appeared to be in good condition.

Assume further that Danny remained quadriplegic until the 16th, when he had an incident wherein he came off the bed and onto the floor.

Assume further, if you please, that he was immediately gone over neurologically, and his condition was found to be precisely the same as it was before he fell.

There were no neurological differences.

On these assumptions, Doctor, wouldn't it be fair to say that Danny's paralysis came from the automobile accident and not from the fall?

* * *

A. No, I don't think it is a direct result of the automobile accident.

* * *

Q. And on the basis of this, you have told this jury that in your opinion, his entire condition is due to the fall rather than the automobile accident. Is this fair?

A. Yes, sir.

* * *

Q. If I follow your answer, there is a corollary to your opinion, and that is that but for the fall from the bed, Dr. Dohn's treatment would have been completely successful and Danny would have regained full and complete bodily function?

A. Sir, that is what I achieved from the question you asked me before, the long question, that the compression was removed and the cord was found in apparent good shape.

Q. And if it is in apparent good shape, that is the end of it, I mean, function will return?

A. As far as the wording, the way it was worded

in such a way that you would take for granted that the cord was in good shape.

* * *.

Q. You have testified that in your opinion, his present condition is solely due to the fall from the bed. You told us that, didn't you?

A. Yes, sir.

Q. Doesn't it follow that if it is solely due to the fall from the bed, had the fall not occurred, Danny would have recovered completely?

A. I would have to assume that, because I never would have seen him if he would have recovered completely. I mean I never would have met him."

To recapitulate in connection with the proof of proximate cause, the record before us does not support the plaintiff's allegations set forth in paragraph 6 of his amended petition to the effect "that because of the aforementioned fall his chances for recovery were made hopeless and permanent damages resulted therefrom; that his condition became that of traumatic quadriplegia because of defendant's negligence." Absent any expert medical testimony that Daniel L. Kayser was recovering and would completely recover from the quadriplegia resulting from the automobile accident, then we are faced with a complete failure of proof that because of the fall from the Stryker bed his chances for recovery were made hopeless and permanent damage resulted therefrom; and absent any expert medical testimony that Daniel L. Kayser would have recovered from the quadriplegic condition diagnosed as a result of the automobile accident, then his condition could not have become that of traumatic quadriplegia because of defendant's negligence in the fall from the Stryker bed simply because such a condition of paralysis cannot be superimposed upon an existing paralytic condition of the same nature. The jury cannot be permitted

to speculate upon the relative amount of injury, if any, due to the automobile accident and then due to the fall from the Stryker bed in connection with plaintiff's quadriplegic condition. There must be some evidence of distinguish the injury, if any, due to each of the two causes.

Likewise, the record before us does not support the allegation in paragraph 7 of plaintiff Daniel L. Kayser's amended petition that plaintiff "being temporarily paralyzed * * *." Paragraph 8 of plaintiff's amended petition is not supported by the record, absent any expert medical testimony on recovery from the original condition of traumatic quadriplegia established by the record as being proximately caused by the automobile accident.

Accordingly, it is our holding that the verdicts and judgments are against the weight of the evidence as to each plaintiff both as to proximate cause that the negligence of defendant, Cleveland Clinic, in connection with the fall of plaintiff, Daniel L. Kayser, from the Stryker bed, resulted in the latter's condition of traumatic quadriplegia, and as to damages therefor, and likewise as to the claim of plaintiff, Leighton W. Kayser, for medical expenses and loss of services.

The other assignments of error are overruled.

As pointed out above in this opinion, there is some evidence in the record that plaintiff, Daniel L. Kayser, suffered an injury at the C-1 atlas level of his spine in the fall from the Stryker bed.

For the reasons stated, the judgments of the court below as to each plaintiff are reversed and cause is remanded to the Court of Common Pleas for further proceedings according to law.

Exceptions. Order see journal.

WASSERMAN, C.J., ARTL, J. concur.

JOURNAL ENTRY OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

This appeal on questions of law came on to be heard on the original papers, including the pleadings, the bill of exceptions, including all of the evidence and exhibits offered upon the trial, the assignments of error and the transcript of docket and journal entries in the Court of Common Pleas for Cuyahoga County and upon the briefs and arguments of counsel, and

Upon consideration thereof, the Court finds that the court below erred to the prejudice of defendant appellant, the Cleveland Clinic Foundation, in submitting to the jury the question of proximate causation between the plaintiff's fall from the Stryker bed and plaintiff's condition of quadriplegic paralysis, absent any expert medical testimony that plaintiff would have recovered from the condition of paraplegia diagnosed after the prior automobile accident, and absent any evidence to distinguish the injury, if any, due to each of the two accidents, and then in entering judgments against defendant, Cleveland Clinic Foundation, and in favor of plaintiffs, Daniel L. Kayser and Leighton W. Kayser, and such judgments are against the manifest weight of the evidence both as to proximate cause and as to damages.

WHEREFORE, the judgments of the Common Pleas Court against defendant, Cleveland Clinic Foundation, are reversed and the cause is remanded to the Court of Common Pleas for further proceedings according to law.

AND it is further ordered that defendant appellant recover its costs herein and that a special mandate issue out of this court to carry this judgment into execution.

Dated July 21, 1969.

JOURNAL ENTRY OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY RECORD.

(December 10, 1969.)

It is ordered by the Court that this motion is overruled.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV.

§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE I, SECTION 5, CONSTITUTION OF THE STATE OF OHIO.

"5. Trial by Jury.

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury." (Adopted Sept. 3, 1912.)

42 UNITED STATES CODE 1983.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1295.

DANIEL L. KAYSER and LEIGHTON W. KAYSER,
Petitioners,

vs.

THE CLEVELAND CLINIC FOUNDATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

RESPONDENT'S BRIEF IN OPPOSITION.

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March 18, 1970.

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

RESPONDENT'S BRIEF IN OPPOSITION.

This is a personal injury action brought in state court under Ohio law.

The Court of Appeals of Cuyahoga County, Ohio, reversed judgment for plaintiffs on the ground "such judgments are against the manifest weight of the evidence both as to proximate cause and as to damages," and ordered the cause "remanded to the Court of Common Pleas [the trial court] for further proceedings" (Petition for Certiorari, p. 40). All three judges concurred.

The Supreme Court of Ohio found no question presented "of public or great general interest" (which under the Ohio Constitution, Article IV, Section 2(B)(2)(d), is

the basis for review in the Supreme Court of Ohio in cases such as this) and, therefore, overruled the motion seeking review (Petition, p. 40), thereby permitting the case to return to the Common Pleas Court for new trial.

The petition for a writ of certiorari, directed to the judgment of the Ohio Supreme Court refusing review, should be denied.

Respectfully submitted,

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March 18, 1970.